No. 06-1539

In The Supreme Court of the United States

MICHAEL MARKOVICH, et ux.,
Parents of Ashlyn M. Markovich,

Petitioners,

v.

MICHAEL O. LEAVITT,
Secretary of Health and Human Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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RESPONDENT'S RELIANCE ON *WHITECOTTON* IS NOT PERSUASIVE.

Respondent contends that *Shalala v. Whitecotton*, 514 U.S. 268 (1995), supports its position that further review of this case by this Court is unwarranted. However, the *Whitecotton* ruling is limited in nature and does not apply to the case at hand.

Whitecotton stands for the proposition that you cannot have two first symptoms or onsets of the same injury. A claimant, to make out a prima facie case of a table injury claim, must have evidence of symptoms of an injury during the table period as well as a showing of no evidence of the injury appearing before the vaccination. *Id.* at 274. Respondent contends that the case at hand is applicable to the facts in *Whitecotton* by claiming that the eye blinking episode shortly after the immunization which was attributed to Ashlyn Markovich being tired was the first symptom and, the August 30, 2000, grand-mall seizure was the second symptom. The Respondent goes on to argue that, based upon the *Whitecotton* holding of not being able to have two first symptoms, r this Court is required to dismiss the Markovich's claim. Respondent's argument is misplaced.

First, *Whitecotton* was limited in nature. *Id.* at 278. *Whitecotton* involved a table injury claim and those types of claims in which evidence of the

same injury exists both before the vaccination and within the timeframe set forth in the table. Under those circumstances, *Whitecotton* may be argued to prevent a claimant from proceeding.

Also, Margaret Whitecotton was born with a condition known as "microcephly", which is a known symptom or evidence of encephalopathy. It was the claim of encephalopathy that *Whitecotton* claimed to have occurred within the timeframe set forth in the table. As a result of the symptom or injury being in existence prior to the vaccination as well as within the timeframe set forth in the table, the claimant was not able to proceed with a table injury claim. *Id.* at 275-276.

In *Whitecotton,* the claimant was well aware of the condition of their daughter both prior to the vaccination as well as aware of the injuries allegedly caused by the vaccination at the time the events occurred. In *Whitecotton*, there was a medical diagnosis as well as specific knowledge of and awareness of the injury by the parents. Neither exist in the case at hand. *Whitecotton* is limited to table injury claims and pre-vaccination injuries. There is no rational basis for extending the *Whitecotton* decision to the case at hand. *Whitecotton* is not persuasive as support for Respondent's position.

CONGRESS COULD NOT HAVE INTENDED WHEN IT ENACTED THE NATIONAL CHILDHOOD VACCINE ACT OF 1986 THAT THE 36 MONTH STATUTE OF LIMITATIONS IS TO BEGIN RUNNING UPON OBSERVATION OF A NORMAL CHILDHOOD ACTIVITY.

Every prior case brought before this Court as well as the lower courts have involved fact situations where the parents were aware of an injury of some type to their child within the applicable statute of limitations period. No case to date has presented a fact pattern where the statute of limitations has been held to start because of an event considered normal childhood activity. On or about July 10, 2000, the date the lower courts determined to be the start of the statutes of limitations, the only evidence of an injury was tiredness. No prior decisions concerning the start of the statute of limitations used a normal activity as a triggering event.

Dr. Corbier testified that eye blinking in and of itself was insufficient to warrant a diagnosis of seizure disorder. App., *Infra*, 114. Dr. Corbier testified before the Special Master that his opinions were benefited by hindsight. *Id.* at 115-116. Dr. Corbier opined that without the seizure of August 30, 2000, based on just what happened on July 10, 2000, there would have been no conclusion or finding of a seizure disorder. *Id.* at 126. Finally, Dr. Corbier testified his linking the eye blinking episode of July 10, 2000, to the seizure disorder of August 30, 2000, was benefited by hindsight. *Id.* at 126-127.

The eye blinking episode by itself warrants no diagnosis by a professional nor did it give Mr. and Mrs. Markovich a basis to conclude anything other than that their daughter was tired. No diagnosis of any injury could have been made based solely on that event without the benefit of hindsight. The episode was a non-event in both the eyes of the claimants as well as the medical community.

If Congress intended to help parents with children inflicted with serious, disabling injuries and even death because of adverse reactions to vaccinations, Congress could not have intended to apply such a rigid, inflexible and unreasonable standard to determine when the statute of limitations begins to run. The current standard as determined by the lower courts in this case is unreasonable, impractical and cannot further Congress' intent as set forth in the National Childhood Vaccine Injury Act of 1986.

CONCLUSION

For the reasons set forth by Petitioners, their Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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